NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-464

MONTGOMERY DWIGHT HEATHMAN APPELLANT	**Opinion Delivered** December 10, 2008
V.	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. CR-07-2460-1]
STATE OF ARKANSAS APPELLEE	HONORABLE WILLIAM A. STOREY, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Chief Judge

Appellant appeals from his conviction of fourth-offense driving while intoxicated, a felony. Appellant argues that the trial court erred in denying his motion for a continuance to permit him to secure the attendance of an out-of-state witness. The witness, who is the daughter of appellant's wife, assertedly would have testified that she had followed appellant's vehicle for a great distance on the date of his arrest and that he was not driving erratically. The trial court, citing the appellant's lack of diligence and the press of a full docket, denied the motion. Appellant contends that this was error. We affirm.

We employ an abuse-of-discretion standard when reviewing the grant or denial of a motion for continuance. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004). The appellant must not only demonstrate that the trial court abused its discretion in denying the motion, but must also show prejudice that amounts to a denial of justice. *Id.* A motion for

continuance based on the absence of a witness must conform to Ark. Code Ann. § 16-63-402(a) (Repl. 2005), which provides that:

> A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it. If the motion is for an absent witness, the affidavit must show what facts the affiant believes the witness will prove and not merely show the effect of the facts in evidence, that the affiant believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement.

The following is the text of the affidavit submitted by appellant:

> I, Montgomery Heathman, after having been duly sworn, states [sic] upon oath as follows:
>
> That I have determined that my wife called law enforcement concerning my trip from Little Rock, Arkansas, to Cave Springs, Arkansas, and that upon her request, her daughter, Sarah Gerbig, left Benton County, Arkansas, to intercept me in the Alma, Arkansas, area and to tail me back into Fayetteville and Cave Springs;
>
> That Sarah Gerbig, did in fact tail me all the way from Alma, Arkansas, to Fayetteville, Arkansas, where I was arrested on the current charge.
>
> She is a member of the Arkansas National Guard and she's currently stationed and located in the State of Mississippi, and unavailable as a witness at this time.
>
> Further, affiant sayeth not.
>
> [Signature]

We think it is noteworthy that, although the absent witness was a relative whose whereabouts were known, appellant stated in his motion that he had not yet so much as interviewed her concerning what she may have observed. Perhaps this is why appellant's affidavit does not state the substance of her expected testimony as required by section 16-63-402(a). Without an affidavit as to the substance of the anticipated testimony, appellant has not made the requisite showing of materiality.

It is clear, in any event, that appellant's hope was that the testimony of the absent witness would show that the police officer lacked probable cause to stop appellant's vehicle. However, the trial court was presented with a videotape of the stop and the testimony of the arresting officer that appellant was speeding and driving erratically, weaving from lane to lane. We have viewed the videotape and it does in fact show that appellant was driving erratically when the stop was made. Given this evidence, and the absence of any statement in the affidavit regarding the substance of the witness's expected testimony or the reason for appellant's delay in obtaining an interview with her that would permit him to state the expected testimony, we cannot say that the trial judge abused his discretion in denying appellant's request for a continuance, or that appellant has shown that the denial of his motion resulted in prejudice so great as to amount to a denial of justice.

Finally, we note that, in his conclusion, appellant urges this court to reduce the conviction to third-offense DWI, a misdemeanor, in the event that his separate DWI conviction in case number CACR08-350 should be reversed on appeal. Because the appeal

in CACR08-350 has yet to be decided, we could take no action on this matter at this time even were we to determine that the question was properly before us.

Affirmed.

GLADWIN and GLOVER, JJ., agree.